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No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

SUPPLEMENTAL BRIEF OF APPELLEES

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November 27, 1985

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Appellees Margaret W. Lavoie and Roger J. Lavoie, Sr. submit this supplemental brief pursuant to Rule 35.5 of the Rules of this Court concerning a matter arising since the filing of Appellees' brief.[1]

ARGUMENT

Argument III of that brief relating to the participation in the proceedings before the Supreme Court of Alabama by Justice T. Eric Embry stated, based upon a stipulation which terminated certain litigation involving

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[1] Counsel for Appellees initially addressed this matter in a letter to the Clerk submitted November 8, 1985.

Justice Embry, that it did not appear that any damages had been paid to him by Blue Cross and Blue Shield of Alabama in settling the case. See Brief of Appellees at i, 18, 22 & 23 n.21. At the time the brief was prepared, inquiries to counsel for both Blue Cross and Justice Embry revealed that the terms of the settlement agreement barred discussion of the case by the parties,[2] leaving the stipulation the only authority available as to the terms of the settlement.

From reports in the press[3] and a deposition of a senior Blue Cross official taken in another matter,[4] it now appears that, in addition to the commitments made by Blue Cross to improve claims practices, Justice Embry received a payment of 30,000 dollars. Blue Cross understood that this amount was intended to cover Justice Embry's legal fees.

From the deposition (a copy of which has been lodged with the Clerk), it appears that Blue Cross determined to settle the action, not because of any increased fear of liability resulting from the decisions of the Supreme Court of Alabama in *Nationwide* or the case at bar, but instead because of the economic burden in terms of legal expenses, computer time, and other resources that would have had to have been expended in defending the class action suit.[5]

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[2] The confidentiality agreement was required by Blue Cross, not Justice Embry.

[3] Legal Times, Nov. 11, 1985, at 2; Los Angeles Times, Nov. 3, 1985, at 10, col. 3.

[4] *Nationwide Mutual Insurance Co. v. Clay*, 469 So. 2d 533 (Ala. 1985), *petition for cert. filed*, 53 U.S.L.W. 3896 (No. 84-1942) (June 13, 1985). The deposition of A. Grey Till, Jr., a Blue Cross official, was taken November 14, 1985 pursuant to Ala. R. Civ. P. 27(b).

[5] None of the documents produced by Blue Cross relating to the settlement contain any mention of these decisions at all.

The fact that Justice Embry received a modest amount in the settlement does not alter the analysis in Appellees' brief. The thrust of both the suit and the settlement, as the stipulation indicated, was to alter deficient claims practices. There is no allegation that those practices were the same as, or even similar to, the abusive practices of Appellant which led to the judgment below.

There is also no indication that the settlement resulted from any perception by Blue Cross of any impropriety on Justice Embry's part. The Blue Cross official indicated that it was his expectation that if the Embry suit reached the Supreme Court of Alabama, Justice Embry would not participate in the decision.[6] Blue Cross was indeed aware that Justice Embry had recused himself in another case involving a bad faith claim against Blue Cross.[7] Although the official indicated a belief that the decision in the instant case had broadened the factual contexts of bad faith liability in Alabama, he conceded that it was no different than earlier decisions of the Alabama court concerning the bad faith tort. There was absolutely no suggestion that the decision below played any part in Blue Cross' decision to reach a settlement in the Embry case.

The additional information revealed since the filing of Appellees' brief confirms the lack of any relation between Justice Embry's suit and the case at bar which rendered his participation in the Alabama court's decision constitutionally infirm. Apart from the fact that both were actions for bad faith denial of insurance claims, the cases bore little similarity to each other. Not even Blue Cross,

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[6] At the time the case was settled, Blue Cross had moved to disqualify the trial judge due to his membership in the putative class, a motion which Blue Cross recognized might make it very difficult to find any judge to try the case.

[7] *Blue Cross and Blue Shield of Alabama v. Granger*, 461 So. 2d 1320 (Ala. 1984).

the defendant in Justice Embry's suit, viewed the *Lavoie* decision as determinative of the other suit. Appellant, therefore, was not denied its right to due process as a result of Justice Embry's role as one member of the Alabama court's majority.

CONCLUSION

For these reasons and those in Appellees' brief, this Court should dismiss this appeal or, if it concludes that it has jurisdiction, should affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

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